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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1193

TELEPROMPTER CORPORATION

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1972

No. 72-

TELEPROMPTER CORPORATION

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Teleprompter Corporation, a defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit (Waterman, Smith and Kaufman, *J.J.*) on January 9, 1973, which affirmed a judgment of conviction entered after a trial before Motley, *J.*, and a jury in the United States District Court for the Southern District of New York. The basic issue in the case, insofar as Teleprompter is concerned, is whether the lower courts looked to the correct sources of law to determine if payments extorted from its former president constituted bribery in violation of the Travel Act, 18 U.S.C. § 1952.*

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* A separate petition is being filed by Irving B. Kahn.

Opinion Below

The opinion delivered in the Court of Appeals is not yet officially reported and is set forth in Appendix A (1a-34a). The opinions of the District Court are reported at 343 F. Supp. 1033 and 343 F. Supp. 1047 and are set forth in Appendices B and C (35a-64a).

Jurisdiction

The judgment of the Court of Appeals, dated and entered January 9, 1973, is set forth in Appendix D (65a). By order of this Court dated February 6, 1973 the time for filing a petition for writ of certiorari by petitioner was extended to March 1, 1973.

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

Questions Presented

I. In a federal Travel Act prosecution involving extensive activity in both Pennsylvania and New York and charging the crime of bribery under Pennsylvania law, where the Pennsylvania law of bribery was "at best, vague," and where the New York law of bribery expressly supported defendant's contention, was it proper for the lower courts (A) to resolve doubts against the defendant by looking to federal cases and "preferable" federal policy rather than probing more deeply into Pennsylvania law or applying New York law; (B) to impose the burden on the defendant to make a "showing" that the admittedly vague Pennsylvania law of bribery excluded his conduct, rather than on the government to make a showing that it included his conduct?

II. Does the crime of "bribery" under the Travel Act apply to payments extorted from a businessman by threats to destroy his business when there is no element of organized crime and no continuous or repeated interstate criminal activity?

III. Was the defendant entitled to a hearing in order to establish its documented allegation that young people between the ages of 21 and 30 were underrepresented on the order of between fifteen to one and thirty to one on the grand jury lists of the Southern District?

IV. Is the false grand jury testimony of a corporate officer admissible against a corporation absent proof of authorization?

Statutes Involved

The statutory provisions involved are: 18 U.S.C. §§ 371 and 1952; Pa. Stat. Ann. tit. 18, §§ 4303, 4304 and Pa. Stat. Ann. tit. 53, § 35911. These statutes are reproduced as Appendix E (66a-69a).

Statement of Facts

The basic issue is whether the Trial Court's interpretation of the Travel Act as contained in its charge provided correct guidance for the jury as to what consequences should follow if they accepted the petitioner's version of the facts. For that reason the facts must be taken to be those most favorable to the petitioner.

Teleprompter was incorporated under the laws of the State of New York in 1951. Teleprompter's co-defendant, Irving Kahn, was a founder of the company and at the

time of the events in question was its president and chief executive officer. He has since been discharged by Teleprompter.

Several years after its founding, Teleprompter became interested in the field of community antenna television (CATV). In 1961, as part of its program to enter the CATV field, Teleprompter acquired the Johnstown, Pennsylvania CATV System for $500,000. From 1961 through 1965, when the incidents surrounding the indictment occurred, Teleprompter invested another $500,000 in the Johnstown System and developed it to the point where the system accounted for 30 percent of the net income of Teleprompter's cable television division.

In 1965, as part of its efforts to raise revenues, the City Council of Johnstown passed an ordinance which placed a tax upon Teleprompter's CATV system. This tax was enacted despite the opinion of the City Solicitor that it was "an illegal revenue raising measure . . . and . . . an unconstitutional interference with the operation of a private Business." In late 1965, negotiations between Teleprompter and the city officials designed to settle the controversy reached fulfillment in an agreement whereby Teleprompter would pay to the city amounts increasing from $7,500 to $12,000 over a ten year period. This agreement was never formally enacted, for early in 1966 the Mayor of Johnstown reversed his position, and introduced at a City Council meeting an ordinance which put up for competitive bid Teleprompter's CATV rights. The defense contended the Mayor's change of position resulted from an offer of a bribe from a local company which was seeking the franchise.

This turn of events brought Irving Kahn to Johnstown in a futile attempt to convince the City Council not to go

ahead with the competitive bidding. During this trip to Johnstown, Mr. Kahn met with the Mayor and two other members of the City Council in a motel room at the Holiday Inn. The nature of this meeting was sharply contested at the trial. The prosecution argued that at this meeting an agreement was reached whereby for a $15,000 bribe, the Mayor and the two other City Councilmen would vote to grant Teleprompter the franchise at the competitive bidding. The defendants argued that what occurred was an attempted extortion of Irving Kahn and Teleprompter by the Mayor which was rejected. The following day the City Council met and refused to cancel the bidding.

On the day of the competitive bidding, Irving Kahn appeared at the meeting and submitted a proposal from Teleprompter to the City of Johnstown which provided revenue and benefits in excess of any qualified formal bid including that submitted by the company which had offered the Mayor the bribe. The City Council voted four to one to accept the Teleprompter proposal and Mr. Kahn returned to New York satisfied that Teleprompter had retained the franchise. Soon thereafter, however, the Mayor publicly announced that Teleprompter had not been officially awarded the franchise and Mr. Kahn was summoned to Johnstown by the Mayor and the two other City Councilmen.

The defense evidence established that upon Irving Kahn's return to Johnstown he was ushered in to see the Mayor alone and was told by the Mayor in no uncertain terms that Teleprompter's successful proposal had cost him a lot of money, and that unless a substantial sum of money were paid to the Mayor, Councilman McKee and Councilman Deardorff, "Teleprompter would not have a prayer in Johnstown."

Evidence introduced at the trial established that at the time of the threat Teleprompter had invested nearly $1,000,000 in its Johnstown franchise; and the Johnstown System, which was the company's second largest, had become a principal factor in Teleprompter's efforts to make cable television its paramount product. The cash flow from the Johnstown franchise was necessary to keep up payments on a term loan then outstanding with The Chase Manhattan Bank and to secure a vital additional $2,000,000 loan from the Prudential Insurance Company. Moreover, the loss of the Johnstown franchise would have seriously set back Teleprompter's efforts to obtain permanent CATV franchises in New York and Los Angeles which were essential to Teleprompter's efforts to become a major factor in the CATV industry. Faced with the devastating effect of losing the Johnstown CATV system, Irving Kahn, the defense contended, submitted to the Mayor's demands and agreed to pay him and his accomplices the money they demanded.

The defendants requested the Trial Court to charge as follows:

> "You will recognize that whether the $15,000 payment was a bribe or an extorted payment presents an issue of fact.
>
> "If you find that the money paid to the Johnstown public officials was paid as a result of extortion, you must find defendants [Teleprompter] and Kahn not guilty on Counts 1-4. Moreover, if after evaluating all the evidence you have a reasonable doubt as to whether the moneys were paid as a result of extortion, you must find the defendants not guilty on those counts."

While acknowledging that this instruction would have been required under the law of New York, the Trial Court refused it. The Trial Court instead instructed the jury that *even an extorted payment constituted bribery* in violation of 18 U.S.C. § 1952 so long as the payment was made with the intention "that the official (the Mayor) . . . be influenced in some way". Since a payment to a public official to prevent him from destroying a vital corporate asset, by definition is intended to influence the public official in some way, the Trial Court's instruction, in effect, amounted to a directed verdict of guilty on the bribery charge.

The Court of Appeals approved the Trial Court's instruction as representing "preferable" federal policy which should be applied where the applicable state law was unclear on the issue.

Reasons for Granting the Writ

1. The Lower Courts Inappropriately Applied Federal Law

This federal Travel Act prosecution is the criminal law analogue to *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938) and its progeny. It raises issues as fundamental to federalism in the context of the federal courts' duty to apply and interpret state criminal law as those decided by *Erie* in the context of the federal courts' duty to apply and interpret state civil law in diversity cases. There are a growing number of federal prosecutions under the numerous and proliferating federal statutes that make it a federal crime to violate state law under certain circumstances. The appropriate weight to be given to state criminal law and policy as opposed to federal law and policy by a federal

court determining whether a state violation did or did not occur has never been decided by the Court. The absence of any authoritative guidance on this important question has resulted in significant confusion in the lower courts. This case is an ideal one for this Court to consider that important issue since it is presented in the sharpest possible factual and legal setting. Defendants, a New York corporation and its president, were prosecuted under the federal Travel Act for travelling between New York and Pennsylvania to commit bribery under Pennsylvania law. Their defense was that they were victims of an extortion by city officials and that an extortion victim who submits to the demands of the extortionist in order to save a vital corporate asset cannot be convicted of bribery.

Teleprompter sought a ruling in the courts below that if the jury believed that the defendant had been the victim of extortion by the city officials, then it could not convict the defendant of the underlying crime of bribery under the Travel Act. The district court found that "Pennsylvania law is, at best, vague on the question of whether extortion is a complete defense to bribery," *United States* v. *Deardorf*, 343 F. Supp. 1047, 1050 (S.D.N.Y. 1971) (41 a) and apparently assuming that the burden was on the defendant to establish that this was the correct interpretation of Pennsylvania law, the court said that "defendants had made *no showing* that extortion is a complete defense to bribery under Pennsylvania law . . . ." *Id.* at 1049 (38 a). It was also acknowledged that the law of New York—the other state in which significant parts of the relevant interstate transactions took place and the state of incorporation and principal place of business of Teleprompter—"explicitly makes proof of extortion a complete defense to bribery." (9 a).

The Court of Appeals, after a cursory footnote discussion of the dicta in two Pennsylvania cases, articulated the two considerations that led it to reject defendant's contention: (i) an opinion of the Second Circuit construing the *federal* bribery statute did not recognize extortion as a complete defense to bribery . . . and (ii) "as a policy matter, we think that the [federal] rule is the preferable one." (10 a) The Court thus turned to *federal* substantive law and policy in order to determine whether or not the victim of extortion can be convicted of bribery under a Travel Act prosecution.* In so doing, it explicitly rejected defendant's request to look more deeply into the Pennsylvania authorities and into the law of New York.

Accordingly, this case clearly raises the important and unresolved issue of what sources of law a federal court should look to in deciding an issue of substantive criminal law under the Travel Act and the other numerous and proliferating federal statutes that make it a federal crime to violate state criminal laws.

The Courts Below Failed to Properly Apply State Law

The Travel Act makes it a federal crime to travel in interstate commerce or use the facilities of interstate commerce with intent to ". . . promote, manage, establish, carry on, or facilitate . . . any unlawful activity." It defines "unlawful

* The Court of Appeals did, of course, add the appropriate boilerplate to the effect that those reasons of federal policy and case law led it to conclude that "the Pennsylvania Courts would not recognize proof of extortion as a complete defense to bribery charges . . . ," (10a) but it gave not an iota of reasoning or citation to support that conclusory remark.

activity" (in the context relevant to this case) as "extortion, bribery or arson" in violation of the law of the state in which those activities were committed. The specific role that the substantive state criminal law should serve under this and other similar statutes has, however, been the subject of much judicial confusion. For example, the Fourth Circuit Court of Appeals has held that in determining the scope and duration of the charged crime, the court must look to the substantive criminal law of the state. *United States* v. *Wechsler*, 408 F.2d 1184 (4th Cir.), *cert. denied*, 395 U.S. 978 (1969). In that case the issue was whether the underlying crime had been completed before or after the defendant's use of interstate commerce; both the majority and dissent looked to Virginia law to determine the scope and duration of the underlying crime. The Eighth Circuit Court of Appeals, on the other hand, has minimized the relevance of state substantive law in Travel Act prosecutions, limiting its use to a broad definitional tool: "Reference to state law is necessary only to identify the type of unlawful activity in which the accused was engaged." *McIntosh* v. *United States*, 385 F.2d 274, 276 (8th Cir. 1967). In that case, the court refused to look to the Missouri substantive law to determine whether the payment of money was a necessary element to the crime of extortion.

The Travel Act was intended to supplement the efforts of the states in combating organized crime. It "reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem." *United States* v. *Nardello*, 393 U.S. 286, 292 (1969). Although this court held in *Nardello* that the state labels and categories for the "unlawful activity" need

not match up exactly with those listed in the act in order to be included in it, there was no question that the "unlawful activity" had to be prohibited by some state law: "[T]he inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged." *Id.* at 295.

The opinions of the lower courts in the case at bar reflected this confusion. They ended their search of Pennsylvania law as to whether the victim of an extortion can be convicted of bribery with the conclusion that "there are no Pennsylvania cases on point". (9a). Rather than consider Pennsylvania dictum on this issue and the general Pennsylvania rules of statutory construction of penal statutes, the lower courts turned to federal cases and decided—as a matter of policy—that the federal rule is "preferable" to the New York rule which defendants had urged. (10a). There can be no dispute that if this were a federal civil diversity case, the lower courts would have been in error in looking to federal policy rather than complying with "the duty of the [federal court] in every case to ascertain from *all the available data* what the state law is and apply it rather than to prescribe a different rule, . . . however much the state rule may have departed from prior decisions of the federal courts." *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940) (emphasis added). Mere difficulty in anticipating state law is not an excuse for not attempting to decide what the highest court of the state would have done in the circumstances. *See McNeese* v. *Board of Education*, 373 U.S. 668, 673, n.5 (1963). In diversity cases, the federal courts must look not to federal cases or policy but rather to "[a]ny convincing manifesta-

tion of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference . . . ." *Yoder* v. *Nu-Enamel Corp.*, 117 F.2d 488, 489 (8th Cir. 1941). There can be no dispute that under the standards required in civil diversity cases, the lower courts erred in their hasty dismissal of state law and their quick resort to federal cases and policy.

Reasons of policy, legislative intent, and constitutionality suggest that this court should require the lower federal courts to follow the same general rule, with at least as much diligence, in criminal Travel Act cases, as it must in civil diversity cases. There should be a clear rule, emanating from this Court determining the hierarchy of substantive law to be looked to by the federal courts in prosecutions under the Travel Act and other similar statutes. There should also be some guidance as to how deeply the federal court should probe the dictum and other "convincing manifestation of local law" before turning to federal cases and policy. That guidance has not heretofore been provided in the context of federal criminal statutes that incorporate state criminal law. In short, petitioner is asking this Court to lay down a principled rule of priorities, as it has done in other areas. See *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940).

The Lower Courts Should Have Probed More Deeply into the Law of Pennsylvania

If the petition for a writ of certiorari is granted to resolve these important issues, petitioner will argue that it was error for the lower courts to prefer and apply federal

law and policy in this case. It will ask this Court to decide that the lower courts should have probed more deeply into the Pennsylvania sources to determine how the Pennsylvania courts would have resolved doubts concerning the construction of the bribery law.

The Pennsylvania courts, like the New York courts (even before the legislature codified the extortion defense to bribery) have said that bribery and extortion are mutually exclusive crimes. *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 191 A.2d 884 (1963), *cert. denied*, 375 U.S. 985 (1964). More specifically, the Pennsylvania courts have reasoned that a victim of a public official's extortion could not be his accomplice. *Commonwealth* v. *Hopkins*, 165 Pa. Super. 561, 69 A.2d 428 (1949); *Commonwealth* v. *Neff*, 195 Pa. Super. 420, 171 A.2d 561 (1961), *rev'd on other grounds*, 407 Pa. 1, 179 A.2d 630 (1962). They have also said that bribery always requires both a giver and a taker and "[e]ach is the accomplice of the other." *Commonwealth* v. *Kilgallen*, 379 Pa. 313, 108 A.2d 708 (1954). Thus, a) if an extortion victim cannot be the accomplice of the extortioner; and b) if bribery requires a giver and a taker, both of whom are accomplices; it would seem to follow logically that c) the victim of an extortion cannot be convicted of bribery. It does not, of course, follow that the *extortionist*—who is not a victim—cannot be convicted of a bribery related crime. *See e.g.*, *Commonwealth* v. *Wilson*, 30 Pa. Super. 26 (1906).*

* The Court of Appeals footnote discussion of *Commonwealth* v. *Bardascino*, 210 Pa. Super. 202, 232 A.2d 236 (1967) is confused and erroneous. The court interprets it as a case where the payor (victim) is considered an accomplice in bribery to one convicted of extortion, and thus the defendant was entitled to an accomplice charge when the payor testified. (9a n.5). Thus, it is claimed the victim of extortion

Even if the meaning of the Pennsylvania bribery law were not this clear the Pennsylvania courts would have resolved all reasonable doubts as to the scope of the law in *favor* of defendants rather than imposing on *them* the burden of making the "showing" that the lower courts required them to do. It is a fundamental principle of the criminal law of Pennsylvania that criminal statutes must be strictly construed in favor of the defendant. This principle has long been honored by the statutory and decisional law of that state. Pa. Stat. Ann. tit. 18, § 5104; *Commonwealth* v. *Derstine*, 418 Pa. 186, 210 A.2d 266 (1965); *Commonwealth* v. *Shook*, 211 Pa. Super. 413, 236 A.2d 559, (1967); *Commonwealth* v. *Masters of Lancaster, Inc.*, 199 Pa. Super. 36, 184 A.2d 347 (1962). Indeed, the Pennsylvania courts have specifically held that the Pennsylvania bribery statutes are to be strictly construed. *Commonwealth* v. *Bausewine*, 156 Pa. Super. 535, 40 A.2d 919 (1945), *rev'd on other grounds*, 354 Pa. 35, 46 A.2d 491 (1946). The Supreme Court of Pennsylvania has stated this matter as forcefully as possible in *Commonwealth* v. *Exler*, 243 Pa. 155, 162, 89 A. 968, 971 (1914):

> "[W]hen a criminal statute calls for construction, it is not the construction that is supported by the greater reason that is to prevail but that one which, if reasonable, operates in favor of life and liberty."*

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is not eliminated from the bribery. This conclusion overlooks the fact that *when the instruction was requested there had been no extortion conviction.* Thus there was no extortion victim. The proposed witness might well be found to be an accomplice in bribery *if the defendant did not extort* him. That was one of the very issues being contested. Of course the lower court in the instant case did not even rely on its mistaken reading of this case, choosing instead to turn to federal cases and policy for its guidance.

* This expression was more recently confirmed in *Commonwealth* v. *Glover*, 397 Pa. 543, 156 A.2d 114, 117 (1959).

The approach of the lower courts, in applying the rule which they considered to be "preferable" as a matter of policy and reason (10a), was diametrically opposed to this fundamental aspect of Pennsylvania law. In doing so and in placing the burden on defendants to make a "showing" that the admittedly vague Pennsylvania law of bribery excluded the actions of the defendants, they committed fundamental error.

The lower court's performance in failing seriously to investigate local law would not have satisfied the requirement in diversity cases. *See McNeese* v. *Board of Education*, 373 U.S. 668, 673 n.5 (1963); *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 236-37 (1940). Since federal jurisdiction under the Travel Act is explicitly designed to assist the states and since state prosecution for the alleged crime is always possible, an even stricter standard with respect to the canvassing of sources of state law should be required. An excellent model of a serious attempt to discover state law, which was a minimum requirement for the courts below, is provided in *Village of Brooten* v. *Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961) (Blackman, *J.*), in which the Court, in interpreting the Minnesota Civil Damage Act, sets forth a careful analysis of intermediate and trial court decisions and the decisions in three other states with similar statutes.

Before Relying on Federal Law and Policy The Courts Below Should Have Considered the Law of New York

If it is unclear what the Pennsylvania law would be, reference should be had to the laws of the State of New York. This Court should seize this opportunity to set down a clear and sensible order of investigation of state law to be

ascertained under the Travel Act. When, as in this case, the law of the state is not obvious, it is appropriate to consult the law in other states. See *Village of Brooten* v. *Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961). Since by definition offenses under the Travel Act have connections to more than one state, a sensible rule would turn to the relevant law of the other state involved to help solve the problem. In the present case, Teleprompter was incorporated, located and doing business in New York, and since the alleged activities took place in both Pennsylvania and New York, it would be fair and proper when determining whether that conduct was criminal to turn to the law of New York in the absence of a clear rule in Pennsylvania.

All parties and the lower courts agree that the law of New York defines bribery to exclude payments made to protect a vital corporate asset against threats of economic extortion. This has been decisional law in New York for almost thirty years. *See Hornstein* v. *Paramount Pictures, Inc.*, 292 N.Y. 468, 55 N.E.2d 740 (1944); *People* v. *Dioguardi*, 8 N.Y.2d 260, 276, 203 N.Y.S.2d 870, 884, 168 N.E.2d 683, 693 (1960).* This prior decisional law was codified by the New York Legislature in 1967. N.Y. Penal Law § 200.05. The courts and legislature of New York have made the policy decision that New York citizens who are the victims of extortion are to be protected rather than prosecuted. By the action of the lower courts the happenstance that the New York citizen is extorted by an out of state public official precludes him from relying upon the

* This result closely parallels the recent decision of this Court that acts of violence in the course of a lawful strike do not constitute extortion under the Hobbs Act. *United States* v. *Enmons*, —— U.S. ——, 41 U.S.L.W. 4301 (Feb. 22, 1973).

protection afforded by New York's penal laws and thwarts the policy objectives of New York as exhibited in that law. Teleprompter was and is headquartered in New York and the actions complained of were partially done within that state. Its expectations were shaped by the laws of New York. The New York courts have found that bribery statutes must be narrowly construed and that involuntary payments cannot reasonably be classified crimes. This Court should grant the writ of certiorari in order to decide if New York law must be applied here before federal law and policy.

The Approach of the Lower Courts Violates Important Principles of Criminal Law, the Constitution and Federalism

The rulings of the lower courts have serious, even dangerous, consequences for several principles fundamental to criminal law, the Constitution, and our federal system.

The resort to federal law and undefined "public policy" upon defendant's failure to make a "showing" as to Pennsylvania law flies in the face of the basic principle of criminal law that penal statutes must be strictly construed in favor of the defendant. *United States* v. *Enmons*, —— U.S. ——, 41 U.S.L.W. 4301, 4306 (Feb. 22, 1973); *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971). As demonstrated above, p. 14 *supra*, this is certainly the law of Pennsylvania.

This mode of decision also violates the fundamental principle of constitutional law that a criminal defendant must be accorded "fair warning" of what conduct is criminal. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Placing the

burden on New York defendants to show that the admittedly vague Pennsylvania bribery law should be strictly construed and then looking to federal cases and policy, as the lower courts did requires defendants "at peril of life, liberty, or property to speculate as to the meaning of penal statutes," a requirement that violates the due process clause of the constitution. *Lanzetta* v. *New Jersey*, *supra* at 453. This doctrine of fair warning is as applicable to unpredictable court decisions as it is to vague statutes. *See Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).

The leading case on the issue of "fair warning" is *McBoyle* v. *United States*, 283 U.S. 25 (1931). In that case, Justice Holmes, writing for a unanimous court, held that the words "motor vehicle," as used in the National Motor Vehicle Theft Act, could not be applied to a stolen airplane even though it was clear that the "policy" of the Act covered airplanes as well as cars. Justice Holmes stated the Court's reasons in a classic formulation: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what that law intends to do if a certain line is passed." *Id.* at 27. The facts of this case call out far more compellingly for an application of the "fair warning" doctrine than did the facts in *McBoyle*. In that case, there was no doubt that the defendant had committed a state crime of which he had received fair warning (knowing possession of a stolen airplane, *Id.* at 25); the only issue was whether there had been fair warning that his criminal conduct constituted a federal crime as well. In

this case, the issue is whether defendant committed *any crime at all*, since if his actions were not criminal under state law, they were not criminal at all. In light of the lower court's acknowledgment that the "Pennsylvania law is, at best, vague on the question of whether extortion is a complete defense to bribery" and that under New York law extorted payments are not bribery it seems clear that defendant was not given fair warning that his actions in submitting to extortionate demands would constitute the crime of bribery.

Finally, resolving doubts—as the court clearly did—against the more limited construction of the state bribery statutes, in the context of the federal Travel Act, raises a serious danger to federalism that this court has recognized is inherent in the Travel Act. As this Court warned in *Rewis* v. *United States:*

> "[A]n expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . geographic origin . . ., a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. 808, 812 (1971).

In *United States* v. *Bass*, 404 U.S. 336, 349 (1972), quoted with approval in the recent decision of *United States* v. *Enmons*, —— U.S. ——, 41 U.S.L.W. 4301, 4306 (Feb. 22, 1973), this Court noted that:

> "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between

> federal and state criminal jurisdiction." (footnotes omitted).

The problems the Court noted in *Rewis* and *Bass* are accentuated in the present case where the issue is whether it should be possible for a federal law which is ancillary to the state criminal law to encompass conduct which the state, if judging the conduct itself, might find completely *non-criminal*. The Travel Act was meant to assist states in their criminal law enforcement, *United States* v. *Nardello*, 393 U.S. 286, 292 (1969), and not to create new offenses.

For these reasons doubts should be resolved against conviction when there is a reasonable question whether certain conduct would or could not be punishable under state law, since it is always left to local authorities to prosecute if they choose. In the latter case, it would be assured that important principles of state law are decided by state courts. If there is a reasonable doubt whether certain conduct would or would not be punishable under state law, it is surely better to leave the possible offender to the powers of the state than to convict of a federal felony one who may have committed no offense under the appropriate law. Federal conviction under such uncertainty would usurp the fundamental authority of the state under the Travel Act to decide what acts are offenses within its jurisdiction, and would resurrect the shadow of the pernicious doctrine of common law crimes—a question which was decided in 1816. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812). Application of these principles to the facts of this case would require reversal of defendant's conviction, since the lower courts both found that there was significant doubt whether the victim of extortion could be prosecuted for bribery

under Pennsylvania law and that he could not be so prosecuted under New York law.

2. Travel Act Policy Precludes a Prosecution for Bribery

It is petitioner's contention that even if this Court should determine that, contrary to petitioner's claim, federal law and policy should be applied to the interpretation of bribery under the Travel Act, a payment of money by a businessman in submission to extortionate threats of public officials does not constitute bribery within the meaning of the Travel Act.

The payments by the defendants to the public officials were not part of a continuous criminal course of dealing. They were in fact an isolated single episode which arose to protect their Johnstown franchise in what was otherwise a completely legitimate enterprise.

In two opinions this Court has had occasion to consider the legislative history and Congressional purpose behind the Travel Act. In *United States* v. *Nardello*, 393 U.S. 286 (1969), the Court noted that the Act was one of a number of "legislative proposals to combat organized crime," *Id.* at 290, and that it was meant to curtail "highly organized syndicates whose influence extends over State and National borders." *Id.* at 293.* In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Court cited the testimony of Attorney General Kennedy testifying in support of the Senate Bill 1652 which contained the questioned provisions:

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* This anti-racketeering concept is expressly considered in its Title: "Interstate and foreign travel or transportation in aid of racketeering enterprises."

> "Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses . . . . Obviously we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." *Id.* at 811-12 n.6.

This reasoning leads to the conclusion that one extorted payment does not constitute bribery under the Travel Act. The statute was designed to prevent organized crime and racketeering. Since members of organized crime are generally not the victims of extortion, punishing the payor of extorted monies has no effect upon organized crime and racketeering and accordingly would not advance the purpose of the Travel Act. It is unreasonable to assume, therefore, that Congress intended to make the victims of extortion punishable under the statute as bribers, especially where the defendant is in a business having no connection whatsoever with organized crime.

The reliance of the courts below on *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), and 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 872 (1969), is misplaced, as it involved an indictment under the federal bribery statute—a statute designed to serve a different and far broader purpose than the Travel Act.

A significant practical reason for the ruling in *Barash* is that the defendant in the *Barash* case could have gained any legal relief he desired by appeal to the crooked agent's superiors within the Internal Revenue Service. Indeed, administrative procedures exist for precisely this purpose. Petitioner had no recourse to counter the Mayor's threats to destroy Teleprompter. Indeed, any complaint to outside

authorities by petitioner would have placed petitioner's word against that of three elected local officials (the Mayor and the two councilmen) and undoubtedly would have made a dangerous situation for Teleprompter infinitely worse.

Finally, the *Barash* charge, as noted above, p. 7 *supra*, in effect constitutes a directed verdict against the defendant even if the jury finds the payment to have been extorted. In recognition of the injustice of such a charge, the District Court in the Southern District of New York since *Barash* has been charging—even under the federal bribery statute—that if payments are made as a result of economic pressure, the defendant must be acquitted. *See United States* v. *Rattenni*, 70 Cr. 308 (S.D.N.Y. 1972).

To interpret the Travel Act to encompass extorted payments as bribery would be inconsistent with the scope and purpose of the federal extortion statute, 18 U.S.C. § 1951. The federal extortion statute—which is modeled after the New York law of extortion (*United States* v. *Enmons*, —— U.S. ——, 41 U.S.L.W. 4301, 4304 n.16 (Feb. 22, 1973)—is also aimed at racketeers and has never been thought to render criminal the conduct of victims who make payments as a result of economic extortion. On the contrary, the cases decided under § 1951 make it clear that a threat of economic injury is sufficient to establish extortion within the meaning of that statute and that the payor in such circumstances is a victim and not a criminal. *United States* v. *Kramer*, 355 F.2d 891 (7th Cir.), *remanded on other grounds*, 384 U.S. 100 (1966); *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964); *Cape* v. *United States*, 283 F.2d 430 (9th Cir. 1960); *United States* v. *Palmiotti*, 254 F.2d 491 (2d

Cir. 1958). Under these authorities the Mayor's conduct in this case violated Section 1951. The result reached by the courts below would sanction the prosecution under Section 1952 of the very class of persons which Congress sought to protect by enacting Section 1951.

Furthermore, a defendant charged with extortion in violation of Section 1951 may defend successfully on the ground that the payment in question was made voluntarily and therefore constituted a bribe. *See e.g. United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965). It is incongruous, to say the least, to accept bribery as a defense to extortion under Section 1951 while at the same time rejecting extortion as a defense to bribery under Section 1952.

In short, a basic question for this Court is whether it is "preferable" Travel Act policy that a businessman have no defense once an extorted payment is made, and once the prosecutor has chosen in his discretion to prosecute the businessman for bribery (§ 1952) instead of the officials for extortion (§ 1951), or whether it is better to submit the question of the cause for the payment to a jury under the proper instructions which petitioner requested.

3. The Denial of Teleprompter's Grand Jury Motion Without a Hearing Was Fundamental Error

Prior to trial, defendant "mounted a massive attack upon the composition of the grand jury that returned the indictment." (27a) No grand jury challenge, based on age discrimination has ever been so extensively supported by expert affidavits and specific allegations of fact. Defendant requested a hearing at which it offered to prove, by expert statistical evidence, that young persons between

the ages of 21 and 30 are under-represented in the Southern District of New York on the order of between fifteen to one and thirty to one. In support of its request for a hearing, defendant submitted the detailed affidavit of Professor Hans Zeisel of the University of Chicago law school, co-author of the *American Jury* and perhaps the nation's leading legal-empiricist. It also offered detailed affidavits by other prominent social scientists. Despite this proffer of evidence, and an extensive supporting legal memorandum, the trial court denied defendant's motion *without even affording it an evidentiary hearing.*

In affirming the action of the Trial Court, the Second Circuit Court of Appeals created a direct conflict between itself and the Third Circuit Court of Appeals which has held that:

> "If a responsible member of the bar charges that the method of selecting jurors is such that his client may not have a fair trial, he should have a chance to prove it. He cannot prove it if a motion based on the assertion of such a situation is overruled without hearing." *Dow* v. *U.S. Steel Corp.*, 195 F.2d 478, 481 (3rd Cir. 1952).

The decision of the Court of Appeals is also in direct conflict with the Jury Selection and Service Act of 1968, which requires the jury selection plan of each district to "prescribe some other source or sources of names *in addition* to voter lists" where exclusive use of voter lists results in substantial underrepresentation of any group who would otherwise be eligible for jury service. It was this mandatory requirement to supplement voter lists in order to achieve a "fair cross section of the community" that dis-

tinguishes the 1968 jury act from its predecessor. To be sure, as the report of the House Judiciary stated, "The bill uses the term 'fair cross section of the community' in order to permit *minor deviations* from a fully accurate cross section." H. R. Rep. No. 1076, 1968 U.S. Cong. Code and Adm. News 1792, 1794. But it cannot be said that underrepresentation "on the order of between 15/1 and 30/1" is a "minor deviation." The holding of the court below denying defendants a hearing to establish underrepresentation on the order of between 15/1 and 30/1 constitutes a holding that such underrepresentation is "minor" and not substantial within the meaning of the 1968 Act. Such a holding, if permitted to stand, would render the Act a dead letter.

Defendant also argued in the courts below that the jury selection plan for the Southern District of New York violated the explicit language and expressed legislative intent of the 1968 Act by providing for the refilling of the jury wheel every four years, rather than every two years as required by the Act. Section 1863(b)2 when read together with Section 1869(c) requires each district to employ election lists from "either the most recent State or the most recent Federal general election, 28 U.S.C. § 1869(c), and Congress intended to "insure that the lists used will in any event not be more than 2 years old." H. R. Rep. No. 1076, 1968 U.S. Cong. Code and Adm. News 1792, 1806-1807. The courts below interpreted this language to mean that the wheel may be refilled every four (or even presumably every eight) years: "the time of refilling is left to the districts." (29a). But when it is refilled "the maximum permissable age of the list" must not exceed two years. If this construction were the correct one,

then Congress would have accomplished nothing by its requirement of using the most recent "general election" lists. Obviously Congress meant for there to be refilling after each general election—when new voter lists are compiled—and Congress made it clear that "regular elections for Members of the House of Representatives are 'general' elections within the meaning of this statute." This case provides this Court with an opportunity to breathe life back into the Jury Selection and Service Act of 1968, by construing it as its framers intended, and not in accord with the administrative convenience of the jury clerks.

4. The District Court Should Not Have Allowed the False Grand Jury Testimony of Kahn to be Used Against Teleprompter.

The Court should take this opportunity to define the proper scope of the admissibility of agents' actions to prove the guilt of their principal. The District Court should have excluded statements of Kahn made before the grand jury on December 19, 1970 as unauthorized. The grand jury testimony of Kahn was admitted against him on the bribery counts for the purpose of showing his guilty state of mind but was inadmissible against Teleprompter unless these false exculpatory statements were specifically authorized by Teleprompter. 2 J. Wigmore, *Evidence*, §§ 278, 280 (3d ed. 1940, Supp. 1970). Even in its brief footnote dismissal of Teleprompter's objection the Court of Appeals did not contest that point, confining itself to the exception for admissions by authorized agents. (34a n.21).

There was no showing of such authorization in this case. "It may be noted that the *fact* of agency must of course be somehow evidenced *before the alleged agent's declarations*

can be received as admissions . . . ." 4 J. Wigmore, *Evidence*, § 1078, p. 176 (Chadbourn Rev. 1972). The Court of Appeals appeared to believe that Kahn's position as president of Teleprompter, with power to conduct the business affairs of the company, settled the question of agency and authorization to give false testimony to a Grand Jury. Mere citation of an agent's title, however, cannot dispose of the specific question of authorization of a statement. Statements of a bank president were held inadmissible in action against the bank as hearsay in *Goetz* v. *Bank of Kansas City*, 119 U.S. 551, 560 (1887). Such specific authorization is particularly essential where, as in this case, the statement of the corporate employee is claimed to be false, rather than true, and is introduced to prove consciousness of guilt. It should be further noted that the interests of Kahn and Teleprompter in this case were conflicting.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 9, 1973.

Dated: New York, New York
March 1, 1973

Respectfully submitted,

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APPENDIX A

Opinion in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 119, 120—September Term, 1972.

(Argued October 18, 1972 Decided January 9, 1973.)

Docket Nos. 71-2205-6, 72-1776-7

UNITED STATES OF AMERICA,

Appellee,

v.

IRVING B. KAHN and TELEPROMPTER CORPORATION,

Appellants.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction and sentences entered after a jury trial in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, of Irving B. Kahn and Teleprompter Corporation for conspiracy and violation of the Travel Act, 18 U.S.C. §1952, of Kahn also for perjury, and from denial of motion for a new trial.

Affirmed.

PETER FLEMING, JR., New York, N.Y. (Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y., John E. Sprizzo and Martin J. Proscia) and Philip Mandel, New York, N.Y., of counsel, *for Appellant Kahn.*

ROBERT B. FISKE, JR., New York, N.Y. (Davis, Polk & Wardwell, New York, N.Y., Dale L. Matschullat and Alan M. Dershowitz, of counsel), *for Appellant Teleprompter Corp.*

JOHN W. NIELDS, Asst. U.S. Attorney, (Silvio J. Mallo, Acting U.S. Attorney for the Southern District of New York, John D. Gordan, III, Asst. U.S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

This case takes us into the corrupt municipal politics of Johnstown, Pennsylvania, where local franchises were apparently granted to the highest bidder—of the biggest bribe to local officials. In 1966, Irving B. Kahn, on behalf of Teleprompter Corporation, made such a payment to three Johnstown officials to insure the retention of a local cable television franchise. The plot was later uncovered, and prosecution ensued. After a jury trial in the Southern District of New York, Constance Baker Motley, *Judge,* Kahn and Teleprompter were convicted of conspiracy and violation of the Travel Act, 18 U.S.C. §1952; Kahn was also convicted of perjury arising out of related grand jury pro-

ceedings. A motion for new trial was denied. Aided by able counsel, both appellants have now launched massive appeals. Nonetheless, we find no error and affirm.

I. The Facts

The background facts are not seriously in dispute. Appellants admit that the payment, totaling $15,000, was made to the three Johnstown officials, and that they paid the money to retain the TV franchise. In defense, they claim that the payment was the result of extortion, threats by the local politicians to destroy Teleprompter's valuable franchise.

The key characters to the drama can be quickly identified. Kahn was the president, founder, and chairman of the board of Teleprompter, which had operated a cable TV franchise in Johnstown since 1961. Kenneth O. Tompkins was the mayor of Johnstown; J. Howard Deardorff and Robert McKee were members of the City Council, who together with Tompkins, comprised a majority of that body.

Tompkins was elected in 1963, on a platform that included promises to increase local revenues from cable TV. In April, 1965, the City Council passed an ordinance, authorizing the granting of "non-exclusive licenses" for the operation of cable television franchises in return for payments to the city of about $12,000 a year. Teleprompter, which until then had been paying $600 annually for what to all intents and purposes was an exclusive license, became understandably upset, and initiated court action to void the ordinance as unconstitutional. Negotiations fol-

lowed, and the parties apparently settled upon an arrangement that would require Teleprompter to make annual payments to the city, beginning at $7500 and increasing to $12,000, in return for an exclusive franchise. This agreement was submitted to the City Council on December 14, 1965, and set down for consideration at the next weekly meeting.

A vote on the Teleprompter agreement never came. On December 21, representatives of four companies appeared at the meeting, and offered to bid on the TV franchise. On December 28, the representative of a fifth firm did likewise. At least two of the companies publicized their offers, which were on the surface considerably more generous than the proposed Teleprompter agreement.[1] On January 18, 1966, the Council announced that bids would be taken for the franchise, which would then be awarded at the February 1 meeting.

Kahn came quickly to Johnstown to fight the proposed bidding. On January 24, he met in his room at the Holiday Inn with Tompkins, Deardorff and McKee. According to Tompkins and Deardorff's trial testimony, Kahn originally tried to argue the three out of going through with the proposed bidding, but finally offered each a $5000 bribe if they would vote for Teleprompter on February 1. All agreed.

On the following day, Kahn appeared before the Council, and maintaining his previous public posture, argued stren-

[1] Trans Video Company of Barnesboro, Pa., offered $421,620 over twenty years, and the Johnstown Traction Company offered $450,000 over twenty years or 4% of gross receipts, whichever was higher.

uously against the proposed bidding. He spent several more days in Johnstown, continuing his public lobbying efforts.

Nevertheless, the bidding went forward. Teleprompter did not formally "bid", but did make an "offer" of $474,000 for a twenty-year exclusive franchise.[2] That bid was accepted by the Council on February 1, subject to further negotiations about specific conditions. Other bids were formally rejected on February 8; after intermediate negotiations between Teleprompter and the city, the franchise was finally awarded on March 2.

In the meantime, on February 26, Kenneth O. Tompkins II, the mayor's son, went to New York City and picked up a $7500 check from Teleprompter's public relations firm. He deposited the check, installment number one of the bribe, in a New York bank, drew two checks, and mailed them to his father, who distributed the proceeds. The next installment came in August, 1966, when the mayor himself went to New York, and collected $6000 from Teleprompter for a fictitious office machine that had allegedly been sold to the local TV franchise by Tompkins' office supply company. The same ploy was used to mask the final $1500 payment, in October, 1966, which was mailed directly to Tompkins' office.

On October 28, 1970, the younger Tompkins received a subpoena to testify before a grand jury in the Southern District. On November 6, he appeared, and falsely testified that the first $7500 check was in return for survey work he had done for Teleprompter. On November 25,

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[2] This stance was apparently taken to protect Teleprompter's litigation posture that the bidding procedure was unconstitutional.

the mayor appeared before the grand jury, and invoked the Fifth Amendment. Deardorff followed suit on December 16. On December 17, Kahn appeared for the first time and testified. He denied the payment of any bribes, and described the survey work allegedly done by the younger Tompkins.

In the next several weeks, the city officials apparently decided to make a clean breast of things. The mayor reappeared on December 22 and Deardorff on December 29, and both testified about the bribes. McKee again declined to testify on December 22, but on December 29 relented and also testified about the bribes. Finally, on January 27, Kahn reappeared, and read a prepared statement, admitting the payments but claiming that they were extorted.

Indictments followed, charging Kahn, Tompkins, Deardorff, McKee and Teleprompter with conspiracy and violation of the Travel Act, and charging Kahn with perjury. Tompkins and Deardorff pleaded guilty to conspiracy and testified for the government at the ensuing trials. McKee's case was severed, and he was convicted[3] after a trial before Judge Motley subsequent to that of Kahn and Teleprompter. The conviction was affirmed here. *United States* v. *McKee*, 462 F.2d 275 (2d Cir. 1972).

II. The Extortion Defense

As noted above, while admitting the $15,000 payments, Kahn and Teleprompter claimed that the money had been extorted from them. The factual outlines of the defense, presented chiefly through Kahn's grand jury testimony,

[3] McKee was acquitted with regard to one Travel Act count.

were as follows. The January 24 meeting at the Holiday Inn was a wholly innocent one, devoted wholly to legitimate lobbying against the proposed bidding. Realizing the apparent futility of its lobbying efforts, Teleprompter decided to make an offer the Council couldn't refuse, and the $474,000 bid followed. The size of the bid caught the mayor and Council off guard, and they were forced to accept it. But this angered the corrupt officials, who had planned to award the franchise to another bidder. Thus, the officials took advantage of the time period after February 1, ostensibly devoted to detailed negotiations, to threaten withdrawal of Council approval unless Teleprompter agreed to a "payoff." These threats, which went to the very economic survival of Teleprompter in the cable TV line, finally overwhelmed Kahn on February 10, and he reluctantly succumbed to the nefarious scheme.

Since appellants fully presented this defense to the jury below, which through its verdict of guilty rejected it, our obligation to view the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), would ordinarily require us to do the same. But, Kahn and Teleprompter claim that Judge Motley's instructions on the extortion defense prevented the jury from fairly considering the issue. It is to those contentions we now turn.

The Travel Act, 18 U.S.C. §1952, makes it a crime to use an interstate facility with intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," including bribery in violation of state law. Just as the initial inquiry in a Travel Act case is whether the underlying

activity violates a state law, *see United States* v. *Nardello*, 393 U.S. 286 (1969), the assertion of a particular state law defense in such a case requires a determination of whether the relevant state recognizes the defense. *United States* v. *D'Amato*, 436 F.2d 52, 53 (3rd Cir. 1970).

In the case at hand, appellants claim that Judge Motley erred by not instructing the jury that the defendants should be acquitted if it were found that they paid the money in response to extortion, or put briefly, that proof of extortion was a complete defense to bribery. Instead, the trial court told the jury that extortionate conduct by the public officials, if proved, could be considered by them in connection with the issue of whether the defendants had the requisite criminal intent and willfulness to violate the law. Since the Travel Act counts here were premised on a violation of several Pennsylvania bribery statutes,[4] the relevant

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[4] The Pennsylvania statutes which Kahn and Teleprompter were charged with violating were as follows:

18 Pa. Stat. § 4303:

"Whoever shall . . . give or make any promise for the payment . . . of any money . . . in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behavior of . . . any officer . . . of this Commonwealth or of any political subdivision thereof . . . in any . . . matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery."

18 Pa. Stat. § 4304:

"Whoever . . . by offer or promise of money . . . endeavors to influence any . . . municipal or other public officer in the discharge, performance or non-performance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation."

53 Pa. Stat. § 35911:

"Any person who shall . . . give or promise . . . any money . . . to any member of council or other city officer . . . to influence him in the performance or nonperformance of any of his public or official duties shall be guilty of bribery."

question is whether Pennsylvania law recognizes extortion as a complete defense to bribery, or whether such a defense is relevant only on the issues of intent and willfulness.

Unfortunately, there are no Pennsylvania cases on point, and such dicta as exist are inconclusive.[5] Appellants admit this absence of state law, but rely heavily on *United States* v. *Corallo*, 413 F.2d 1306 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), where this Court held "wholly unexceptionable" jury instructions which characterized extortion as a complete defense to bribery. *Id.* at 1323. However, the *Corallo* Travel Act prosecution was premised on an underlying violation of New York law, and New York Penal Law §200.05 (McKinney 1967) explicitly makes proof of extortion a complete defense to bribery. The Pennsylvania bribery statutes contain no such provision, and we think it would be anomalous to read into the Pennsylvania code a

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[5] Appellants cite such cases as *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 191 A.2d 884 (1963), *cert. denied*, 375 U.S. 985, (1964), where it was stated that "it is generally held that" bribery and extortion are "mutually exclusive crimes." 191 A.2d at 889. In return, the goverenment cites *Commonwealth* v. *Bardascino*, 210 Pa. Super. 202, 232 A.2d 236 (1967), where a magistrate and court clerk were convicted of both bribery and extortion in connection with demanding and receiving $100 in setting a low bail for a defendant. In *Bardascino*, the appellants were held entitled to an accomplice charge with respect to the testimony of the payor, since, but for immunity, he could have been convicted of bribery. 232 A.2d at 242. The government argues, rather convincingly, that if extortion were a complete defense, the payor could not be convicted of bribery, in view of the previsous extortion convictions of the magistrate and clerk.

While the government thus probably has the better of the dicta, we are reluctant to rely heavily upon these cases, where the basic issue was not even raised, and where the statements were made in contexts far different from the one at hand.

provision that the New York legislature thought required a separate and explicit section in its state law.

At least two other considerations support this conclusion. In federal prosecutions under 18 U.S.C. §201, this court has refused to follow the New York rule of calling extortion a complete defense to bribery, but has instead held that such proof is relevant as bearing on the issue of intent. *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966) (*Barash I*). There appears no reason to reach a different result with respect to Pennsylvania law, which, like §201, is conspicuously silent on the subject.

Finally, as a policy matter, we think that the *Barash I* rule is the preferable one. Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by "dirty money," if not nonexistent, are at least exceedingly rare. The proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff. Thus, unless the extortion is so overpowering as to negate criminal intent or willfulness, we would be loath to allow those who give in to the illegal coercion to claim it as a total defense to bribery charges.

For all these reasons, we agree with Judge Motley that the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges, but would find the defense relevant only on the issues of intent and willfulness. Perhaps foreseeing this result, appellants claim that, even recognizing the validity of the general *Barash I* principle, Judge Motley's instructions on the extortion defense were erroneous.

At the outset, it is clear that Judge Motley's instructions virtually mirrored those approved by this court in *United States* v. *Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969) (*Barash II*). Kahn and Teleprompter, however, point to two instances where the charge deviated, albeit slightly, from *Barash II*, and claim prejudicial error.

First, appellants object to that portion of the charge where Judge Motley told the jury that bribery is committed where "the paying party intended that the official be influenced in some way." They claim that the correct instruction would be that the defendant must have intended to influence the official in *public* actions, and since a bribe by definition is designed to influence "in some way," this charge amounted to a directed verdict of conviction.

Whatever the technical merits of appellants' reasoning, it is inapplicable here. The objected language here occurred but two sentences after the point where the jury was told that bribery required the intent to influence a "public officer with respect *to any official act.*" (Emphasis added). Following so closely on such an instruction, the objected language hardly constituted prejudicial error. Indeed, on the facts of this case, it is difficult to see how the jury could have been affected at all by the challenged instruction. It was undisputed that the money was paid to secure the franchise, and awarding of the franchise was surely an official act.

Appellants' second objection to the charge is similarly meritless. In explaining the extortion defense, Judge Motley told the jury that economic coercion was relevant to the issue of whether the defendants "had the requisite in-

tent to influence action of a public official." Again, the claim is that the correct charge should have been "official action." But in the factual context of this case, where nothing but official action was at issue, and given the earlier instruction about bribery requiring the intent to influence an officer "with respect to any official act," there was clearly no error. Looking at the charge as a whole, *Barash II*, *supra*, 412 F.2d at 30, we find that Judge Motley fairly and completely presented the extortion defense to the jury, which clearly rejected it.

III. Rulings on the Evidence

Kahn (but not Teleprompter) has attacked five specific evidentiary rulings by Judge Motley. In each instance, he claims that the ruling unfairly restricted him in presenting his basic extortion defense. We find no error in the rulings, either individually or collectively.

A. *Evidence that Tompkins was corrupt.*

Judge Motley excluded an offer of proof that Kahn claims would have established Tompkins' "habitual corruption." The proof would have shown that one Cornelius, now deceased, had made collections from billiard parlors, card games, and local clubs, in order that these activities might remain in business. The proof would have shown that Cornelius' driver picked him up at City Hall daily, drove him on his rounds, and always dropped him off at City Hall. Kahn claims that this conduct is traceable to the mayor, and buttresses his extortion defense.

Judge Motley's exclusion of the proof was an appropriate exercise of her discretion. First of all, there was no clear link between Cornelius' alleged conduct and Tompkins. Moreover, the offer presented the very real danger of degenerating into a side trial, both to determine whether the "collections" actually occurred, and to determine whether the mayor was behind this activity. Much as Kahn would have preferred that this trial be one of Tompkins, not himself, the proffered evidence seems clearly collateral and of doubtful probative value.

Recognizing the dangers of confusing the jury with collateral issues, we have recently emphasized the general rule that prior misconduct of a witness not resulting in a conviction is inadmissible as direct proof. *United States* v. *DeSapio*, 456 F.2d 644, 648 n. 1 (2d Cir. 1972); *United States* v. *Glasser*, 443 F.2d 994, 1003 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). That rule has particular relevance here, where the misconduct is not clearly linked to the relevant witness. Under the circumstances of this case, Judge Motley did not err in excluding this evidence.[6]

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[6] *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966), upon which Kahn heavily relies, is not to the contrary. It is true that Judge Moore in *Bowe* recognized that evidence of a police agent's past entrapment activities was relevant to a defendant's claim that the officer caused him to commit a crime he otherwise would not have. But Judge Moore went on to note that exclusion of the evidence in that particular case was not error, in view of the limited probative value of the evidence and the very real danger that the jury would be misled into a "trial within a trial." 360 F.2d at 15-16. Thus, the *Bowe* court recognized that a trial judge has broad discretion in deciding whether to admit such evidence, after balancing the damages of its introduction against its probative value. *Cf. United States* v. *Costello*, 221 F.2d 668, 674 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956). Judge Motley correctly exercised such discretion in the case at hand.

B. Evidence Relating to Trans Video Company and All State Systems.

At the December 21 and 28, 1965 meetings of the Johnstown City Council, representatives of five concerns announced that they were interested in bidding. Two of these prospective bidders were not named at the meetings; the other three were Trans Video Company of Barnesboro, Pa., All State Cable Company of Ridgeway and Doylestown, Pa., and Johnstown Traction Company.

At trial, Kahn offered to show that neither All State nor Trans Video had a telephone listed under those names during 1965-67; and that All State did not operate a cable system in Doylestown.[7] Judge Motley excluded the evidence. Kahn now argues that the proof would have demonstrated that these two bidders did not exist, and that they were part of Tompkins' plot to extort money from Teleprompter.

We find no error in Judge Motley's ruling. Even assuming *arguendo* that failure of a company to have a phone number under its precise corporate name is probative of nonexistence, the other premises do not follow. First of all, there was no evidence to link this alleged sham up to Tompkins, who stated on the stand that he knew nothing of these two firms before the date of the bidding. Second, when the time for actual bidding, February 1, 1966, did arrive, each of the three companies made formal bids—Johnstown Traction's accompanied by a bid bond and All State's by a $10,000 check. In addition, C.A.T.V. Corpora-

[7] The offer did not indicate that All State did not operate a system in Ridgeway.

tion of Pittsburgh submitted a formal bid. Finally, Kahn makes no claim that Johnstown Traction or the Pittsburgh firm did not exist. The possibility of the mayor's use of phony firms to blackmail Teleprompter is greatly lessened, if not negated, by the actual submission of bids by these firms and by the involvement of admittedly genuine corporations in the entire process.

In short, the evidence was not truly probative on the extortion issue, and even if probative, was clearly collateral. The trial court quite properly exercised its discretion in excluding it. *See generally* C. McCormick, Evidence §152 at 319-20 (1954); *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966).

C. Limiting Cross-examination of Deardorff.

On direct examination and on cross-examination by Kahn, Deardorff testified about the January 24, 1966 meeting at the Holiday Inn. During further cross-examination by Teleprompter, Deardorff said that he could not recall whether any bids were in before that January 24 meeting. Counsel for Teleprompter attempted to pursue the issue, but Judge Motley cut him off: "He says he doesn't recall. . . . Proceed."

Kahn then attempted to pursue this line on recross. Judge Motley, consistent with her previous ruling, refused to allow the questioning. Kahn now claims that had he been allowed to proceed, Deardorff would have admitted that the bids were in fact in at the time of the meeting, which would have shown that the rendezvous took place after February 1. This, in turn, would have buttressed Kahn's claim that the payments were not promised until February 10.

It is a basic principle that a trial judge has extensive discretion in controlling the scope and length of cross-examination. See, e.g., *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Dorfman*, —— F.2d —— (2d Cir., Nov. 29, 1972). The basic rule would seem to apply with special force to recross, especially after a full and searching cross-examination. *Cf. Turner* v. *United States*, 441 F.2d 736 (5th Cir. 1971). Here, there was clearly no abuse of Judge Motley's discretion. Kahn's argument is based on the sheer conjecture that, given recross, Deardorff would have broken down and changed his story. While we doubt that such speculation can ever justify extended recross, the evidence in this case makes such a course particularly inappropriate. Deardorff testified that the meeting took place at the Holiday Inn, and both Tompkins and Kahn, not to mention the motel records, put the date of this encounter at January 24. Moreover, Deardorff testified that he promised Kahn his vote at the meeting, and that Kahn had tried to "cancel the bidding." Neither of those statements is consistent with a meeting after February 1, when the bidding had occurred and the votes were in.

D. *Exclusion of a Statement Claimed to Have Been Made by Tompkins.*

As part of the defense, Paul Malinowsky, a Johnstown City Councilman, testified. Part of his testimony would have been that the mayor had said several weeks earlier, "I'll tell you one thing, if I am going to go down, everybody is going to go down with me." Judge Motley excluded that statement as an attempt to impeach a witness through collateral matters.

Kahn, citing cases that hold that bias is never a collateral matter, *e.g.*, *United States* v. *Haggett*, 438 F.2d 396 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971), claims that the statement exposed Tompkins as vindictive, and showed his clear motive to lie on the stand. But, at least on its face, the excluded statement is not convincing evidence of bias. The more likely reading of the words, as the government suggests, is simply that Tompkins, once exposed, was going to make a full disclosure and make sure that his co-conspirators did not escape their just desserts. Given the ambiguous nature of the proffered statement, its exclusion was not error.

Moreover, we note that Tompkins was never confronted with the statement on cross-examination. Professor Wigmore has suggested that the same reasons of fairness that require that a witness be given an opportunity to explain away a prior inconsistent statement also apply when the utterance is claimed to show bias, Wigmore, Evidence §953 (Chadbourne rev. 1970), and a number of courts have agreed. *Smith* v. *United States*, 283 F.2d 16, 20-21 (6th Cir. 1960), *cert. denied*, 365 U.S. 847; *United States* v. *White*, 225 F. Supp. 514, 519-21 (D.D.C. 1963), *rev'd on other grounds*, 349 F.2d 965 (D.C. Cir. 1965). We noted our approval of this rule in *United States* v. *Hayutin*, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), and we reiterate that approval today. While we hold that exclusion of the statement under any event was not reversible error, the proper course should have been to confront Tompkins with it on cross-examination, to allow him to explain or deny it. Such a procedure is especially desirable in a case like this, where the utterance is ambiguous on its face, and where confrontation may aid in interpretation.

E. *Judge Motley's Refusal to Give an Advisory Ruling On the Scope of the Government's Cross-examination of Kahn.*

Prior to the beginning of the trial, the government indicated that it hoped to offer evidence with respect to a payment of $50,000 in 1968 by Teleprompter to city officials in Trenton, New Jersey. Judge Motley ruled that the prejudicial effect of such evidence would outweigh its probative value, and she excluded it. She refused, however, to give an advance ruling about whether this evidence could be used in cross-examination if Kahn took the stand, saying that in some cases it might be proper.

Kahn never took the stand. He now claims that Judge Motley's refusal to rule out cross-examination on the point was error, and that it was this ruling that prevented him from testifying in his own defense.

While we have made it clear that a trial judge has the power to give an advance ruling on the permissible scope of cross-examination, *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), it is also clear that such "highly discretionary adjudications" will not be reversed "unless the wisdom of so doing is very clear." *Id.* at 274; *Brooke* v. *United States*, 385 F.2d 279, 286 (D.C. Cir. 1967). We have explicitly refused to turn the Palumbo rule of discretion into one of compulsion, and have indeed emphasized that the trial court's power to limit cross-examination is often best exercised after hearing the direct testimony of the witnesses. *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Crisona*, 416 F.2d 107, 117 (2d Cir. 1969), *cert. denied*,

397 U.S. 961 (1970); *United States* v. *Cacchillo*, 416 F.2d 231, 234 (2d Cir. 1969). Judge Motley's actions here clearly fall far short of constituting an abuse of discretion.

III. The Perjury Count

Kahn has mounted a four-pronged attack against his perjury conviction. He claims (1) that he was prosecuted under the wrong statute; (2) that without regard to the proper statute, Judge Motley erred in her jury instructions concerning recantation; (3) that the trial court erred in allowing the jury to consider his January 27, 1971 grand jury testimony as evidence of the falsity of his original December 17, 1970 testimony; and (4) that Judge Motley erred in instructing the jury about what constitutes perjury.

Kahn was indicted under 18 U.S.C. §1621, the general perjury statute. However, on October 15, 1970, Congress enacted Pub. L. 91-452, the Organized Crime Control Act of 1970. *Inter alia*, that Act added §1623 to Title 18. That section, applicable only to false declarations made in court proceedings or before grand juries, does away with the ancient "two-witness" evidentiary rule in perjury cases, and provides:

> "(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission was made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has or will be exposed."

Kahn now cites cases such as *Kepner* v. *United States*, 195 U.S. 100, 125 (1904); *Shelton* v. *United States*, 165 F.2d 241, 244 (D.C. Cir. 1947); and *United States* v. *Wechsler*, 158 F. 579, 581 (2d Cir. 1907), for the proposition that a statute aimed at specific conduct prevails over an otherwise applicable general statute. Just as *Shelton* and *Wechsler* found perjury prosecutions improperly brought under the general statute when special perjury statutes were available, Kahn would have us find that he should have been prosecuted under §1623, not §1621. And, he claims, had the prosecution been under §1623, his January 27 "recantation" would have barred perjury prosecution.

In response, the government claims that §1623 did not repeal §1621, and that the prosecutor has the absolute discretion to choose which section an alleged perjurer will be tried under, and consequently, what evidentiary rules will apply to his trial. While it is clear that §1623, which applies only to grand jury and court proceedings, did not wholly replace §1621, which covers oaths before any "competent tribunal, officer, or person," we admit great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it meant to do so here.[8] And, we find not a little

[8] The legislative history cited by both sides is inconclusive. The government refers to comments by the Justice Department, incorporated in S. Rep. 91-617, 91st Cong., 2d Sess. 109 (1969), that §1623 is "an additional felony provision" which is intended to "supplement, not supplant existing perjury provisions"; and to comments by an A.B.A. representative that §1623 "is not an amendment of the present perjury statute but . . . a new addition." Hearings on S. 30 before Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 264

disturbing the prospect of the government employing §1621 whenever a recantation exists, and §1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position.

However, we need not reach the merits of the government's position in the case before us. Even assuming *arguendo* that the indictment named the wrong statute, there was no prejudice to Kahn. The substantive elements of perjury are the same under either statute, and since the trial court applied the "two-witness" rule, Kahn got at least his due, if not more, on the evidence. Kahn's only serious claim is that §1623(d) entitled him to a complete recantation defense. But at the time of Kahn's January 27 grand jury testimony, Tompkins, Deardorff, and McKee had all testified to the bribes that Kahn had falsely denied on December 17. We find, as did Judge Motley, that on January 27 it had already "become manifest that such falsity has or will become exposed," so that, by its own

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(1969). But such comments can be explained by the fact of §1623's limited reach; even if §1623 were the exclusive vehicle for prosecutions of perjury before courts and grand juries, §1621 would still be needed to reach false declarations before administrative tribunals and others, and hence would not be supplanted or amended by the new section.

Conversely, Kahn's reliance upon a statement by a Justice Department representative that §1621 covers proceedings that §1623 does not, Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. 637 (1970), hardly shows that §1623 is the sole vehicle for prosecuting perjury committed before courts and grand juries. Even if the government's argument about both sections being available here were correct, §1621 would extend to administrative proceedings, which §1623 clearly does not.

terms, a §1623(d) defense was not available to Kahn.[9] And, absent the availability of such a defense, there was no prejudice here even if the government named the wrong statute. *United States* v. *Clizer*, 464 F.2d 121, 124-25 (9th Cir. 1972). *See also, United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941); *United States* v. *Nixon*, 235 U.S. 231, 235 (1914); *Williams* v. *United States*, 168 U.S. 382, 389 (1897); *United States* v. *Calabro*, 467 F.2d 973, 981 (2d Cir. 1972); *United States* v. *Galgano*, 281 F.2d 908, 910-11 (2d Cir. 1960), *cert. denied*, 366 U.S. 960 (1961); *United States* v. *McKnight*, 253 F.2d 817, 820 (2d Cir. 1958); Fed. R. Crim. P. 7(c).

Kahn next claims that Judge Motley erred in instructing the jury about his January 27 "recantation." He requested a charge that recantation is "potent evidence to negative a wilful intent to swear falsely," citing *Beckanstin* v. *United States*, 232 F.2d 1, 4 (5th Cir. 1956). Instead Judge Motley told the jury that "recantation or retraction is relevant only in showing an absence of intent to commit perjury. It does not excuse the initial perjury."

Beckanstin, upon which Kahn relies, is readily distinguishable from the case at hand. In *Beckanstin*, the defendant, when asked what school he had graduated from, responded, "Massachusetts Institute of Technology." In fact, he had merely attended the school, and corrected his testimony as soon as he realized the mistake. In revers-

[9] Moreover, since §1623(d) says that an admission of the falsity of the prior declaration "shall *bar prosecution*," (emphasis added) it would seem that the defense should be raised prior to trial, and disposed of then by the judge. Here, the issue was not raised until just before the charge to the jury, in a motion for a judgment of acquittal.

ing a perjury conviction, the Fifth Circuit not only felt that the misstatement was not material, but that all the circumstances showed no intent to deceive. It was within this context, where the appellate court ruled that the perjury indictment never should have gone to the jury, that the "potent" language appears.

There were no such exigent circumstances here, and there was ample evidence to go to the jury on perjury. Judge Motley's instructions represented an accurate characterization of the law, and we find no error in her giving them. *See United States* v. *Norris*, 300 U.S. 564, 576 (1937); *United States* v. *Lococo*, 450 F.2d 1196, 1198 n. 2 (9th Cir. 1971). *Cf. United States* v. *Hirsch*, 136 F.2d 976, 977 n. 1 (2d Cir.), *cert. denied*, 320 U.S. 759 (1943).

Kahn next contends that his January 27 grand jury testimony could not have been used by the jury to decide the falsity of his December 17 testimony, and that Judge Motley erred by instructing to the contrary. But in *United States* v. *Goldberg*, 290 F.2d 729, 733-35 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961) and *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965), we held that extrajudicial statements which contradict a defendant's sworn testimony were admissible to prove perjury.[10] The same result would seem to apply *a fortiori* to prior judicial tes-

[10] The narrow question in *Goldberg* and *Marchisio* was whether the statement could be used, in addition to independent corroborative evidence of perjury, to satisfy the "two-witness" rule, which had been designed to prevent convictions based upon an "oath against an oath." We held in both cases that the independent evidence in effect served as the first witness, so that prior statements might take the role of the second one. In the case at hand, there is no claim that, apart from the January 27 testimony, there was not sufficient independent proof of perjury to satisfy the two-witness rule.

timony, which is certainly no less of an admission than extra-judicial utterances and can invariably be put in evidence through the use of certified transcripts, thus avoiding difficulties inherent in witnesses' recollection. The use of the January 27 testimony here was proper.[11]

Finally, Kahn claims that Judge Motley erred in failing to instruct the jury that a "literally truthful" answer could not constitute perjury. Instead, she merely told the jury that to constitute perjury, a statement had to be false.

We find no error in those instructions. Neither the majority opinion nor the dissent in *United States* v. *Bronston*, 453 F.2d 555 (2d Cir. 1971), *cert. granted*, 405 U.S. 1064 (1972), suggests a different result. Both Judge Oakes' panel opinion and Judge Lumbard's dissent recognized in *Bronston* that the defendant's actual response to the question put was indisputably true.[12] The opinions part company on the issue of whether an acquittal should have been granted *as a matter of law*, or whether the false implication and evasiveness in the answer justified leaving the issue of perjury to the jury. Here, Kahn's answers *themselves* surely could have been found false by the jury; indeed, it would have been surprising if they had not so

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[11] Indeed, if we accept Kahn's view and characterize this prosecution as one under the new perjury statute, §1623(c) explicitly makes the prior inconsistent testimony admissible.

[12] The defendant in *Bronston* responded to a question about whether he had a Swiss bank account with the answer "The Company had an account there for about six months, in Zurich." It was undisputed that the company did have such an account; the majority and the dissent take issue on whether a perjury conviction would be sustained on the ground that the answer constituted a lie by negative implication, i.e., that Bronston himself did not have such an account.

found.[13] There was overwhelming evidence of perjury in the record, and the jury would have been remiss in reaching any other conclusion.

IV. The Applicability of the Travel Act

Kahn next claims that since the transactions in question here were "isolated" and had no connection with a comprehensive scheme of interstate racketeering, application of the Travel Act, 18 U.S.C. §1952, was improper. He relies chiefly upon *Rewis* v. *United States*, 401 U.S. 808 (1971), and two of its progeny, *United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971), and *United States* v. *McCormick*, 442 F.2d 316 (7th Cir. 1971).

None of those cases calls for reversal of the Travel Act convictions here. In *Rewis*, the Supreme Court held that neither the language nor the legislative history of the Travel Act showed that Congress intended the statute to apply to a purely local gambling operation just because some of its *customers* crossed state lines. *Altobella* reached a similar result in a case where the only use of interstate

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[13] For example, the indictment includes this colloquy among its assignments of perjury:

> "Q. Isn't it a fact that really what happened here is, you agreed to give Mayor Tompkins, $7500, and the best way it could be disguised was camouflage this fee by the payment to George Daley and Kenneth Tompkins, Jr., which went back to his father?
>
> A. It's not a fact, absolutely not.
>
> Q. Would it surprise you to learn that the $7500 that you paid Kenneth Tompkins, Jr., went to his father?
>
> A. It would."

While Kahn was surely entitled to argue to the jury that he was in fact surprised, *we* would have been surprised had they agreed.

facilities resulted from the fact that an extortion victim cashed a check on an out-of-state bank to pay off the defendants. Similarly, in *McCormick* the only ostensible interstate facet of the crime, running an illegal Indiana lottery, occurred when a local newspaper in which the defendant had advertised for some salesmen mailed some of its copies out of state.

The common thread through each of these decisions is that the defendants themselves engaged in no interstate activities, and that the total interstate travel aspect of the enterprises was either marginal or unforeseen. Indeed, the *Rewis* court left open the question of whether proof of active solicitation of an interstate clientele might come within the Act, and cited with explicit approval cases where the statute was applied to individuals whose agents or employees crossed state lines in furtherance of an illegal activity. 401 U.S. at 813, 814. And, in *United States* v. *Lee*, 448 F.2d 604, 606-7 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971), the Seventh Circuit found *Rewis* and *Altobella* inapplicable where the interstate travel was that of a member, rather than a victim, of the illegal enterprise.

The case at hand shows a knowing and intentional use of interstate commerce not only by various members of the conspiracy, but also by Kahn himself. Kahn went from New York to Johnstown and agreed upon the illegal payments; Kahn arranged for one check to be mailed from New York to Pennsylvania; the mayor and his son came up from Johnstown to New York on two separate occasions to collect payoff checks from Kahn and Teleprompter. Such activities, far from representing the unforeseen and marginal use of interstate facilities present in *Rewis* and its progeny, constituted conduct central to the illegal enter-

prise performed by partners to the crime. The Travel Act was correctly applied. *Cf. United States* v. *Levine*, 457 F.2d 1186, 1188-89 (10th Cir. 1972).

V. The Composition of the Grand Jury

Both at the trial court and on appeal, Teleprompter and Kahn have mounted a massive attack upon the composition of the grand jury that returned the indictment. The challenge is basically three-pronged: (1) that the Southern District Plan for Random Jury Selection, which mandates the use of voter registration lists as the source of names of those who sit on grand juries, is unconstitutional because it results in underrepresentation of those between the ages of about 24 and 30 because they tend to register in fewer numbers than older voters; (2) that since the grand jury plan at the time of the indictment excluded all 18-20 year olds, they were denied equal protection;[14] and (3) that the refilling of the grand jury master wheel every four years conflicts with the Federal Jury Selection and Service Act, 28 U.S.C. §1861 *et seq.*

The first two contentions are foreclosed by the thoughtful opinion of Judge Hays in *United States* v. *Guzman*, —— F.2d —— (2d Cir., Nov. 8, 1972), which carefully considered and rejected identical claims. We see no reason to add to what was said in that decision here.

As to the third claim,[15] it finds its basis in the language of 28 U.S.C. §1869(c), which defines "voter lists" as those

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[14] By an amendment on April 6, 1972, 28 U.S.C. §1865(g)(1) now provides that 18 years of age is the minimum age for grand and petit jury service. Pub. L. 92-269; 86 Stat. 117.

[15] This contention was considered, and rejected, by the district court in *Guzman*, 337 F. Supp. 140, 145 (S.D.N.Y. 1972), but was not raised on appeal. —— F.2d at —— n. 4.

from "either the most recent State or the most recent Federal general election." Teleprompter and Kahn contend that this provision reflects a requirement by Congress that the master jury wheel be refilled every two years. They point to a passage in H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Adm. News 1792, 1806-7, stating that the statute insures "that the list used will in any event not be more than 2 years old," as supporting this view.

At the time of the indictment here, 18 U.S.C. §1863(b)(4) only required that a jury selection plan "provide for periodic emptying and refilling of the master jury wheel at specified times." Surely if Congress intended that the wheel be refilled every two years, it could have found a more direct way of saying so.[16] Indeed, H.R. Rep. No. 1076 makes it clear that this provision was adopted to avoid court clerks' objections to previous drafts, which had required refilling of the master wheel at "specific times." 1968 U.S. Code Cong. & Adm. News at 1800.

We find that the Southern District Plan's requirement of refilling every four years did not conflict with the Act. *Accord, United States* v. *Kuhn*, 441 F.2d 179 (5th Cir. 1971). Such an interpretation is wholly consistent with the language relied upon by appellants in the House Report. The entire sentence in which the "two year" language appears reads as follows: "Accordingly, while the two subsections [1869(c) and (d)] permit the plan to choose between State and Federal lists, they also insure

[16] In fact, Congress on April 6, 1972 amended §1863(b)(4) to provide for refilling every four years. Pub. L. 92-269; 86 Stat. 117.

that the list used will in any event be not more than 2 years old." This passage, when read in conjunction with the other provisions of the statute, appears to say that when a new list is *chosen*, that new list itself must be less than 2 years old. Thus, while the time of refilling is left to the districts, the maximum permissible age of the list used is not.

VI. The New Trial Motions

As noted previously, McKee was tried subsequently to Kahn and Teleprompter. Relying on several pieces of testimony from that trial, appellants made a motion for a new trial based on newly discovered evidence to Judge Motley. She denied the motion; Kahn and Teleprompter assign that denial as error.

The general standard governing motions for a new trial on the grounds of newly discovered evidence is familiar. The evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict in the event of a retrial. *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir. 1972); *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). The function of a court of appeals in reviewing a denial of an ordinary new trial motion is a limited one; the motion is directed to the trial court's discretion and factual determinations may not be set aside on review unless "wholly unsupported by evidence." *United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946); *United States* v. *Silverman*, 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972); *Brady* v. *Maryland*, 373 U.S. 83 (1963). The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. *Polisi*, *supra*, 416 F.2d at 577; *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968). In each of these instances, the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict. *Polisi*, *supra*; *United States* v. *Bonanno*, 430 F.2d 1060, 1063 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145-47 (1964).

If the government's nondisclosure is merely inadvertent, and does not involve evidence whose high value to the defense could not have escaped notice, however, a somewhat stronger burden is put on the defendant. While the movant is still not required to show the probability of a different verdict upon retrial, setting aside a conviction is only called for when there is "a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969); *United States* v. *Mayersohn*, 452 F.2d 521, 526 (2d Cir. 1971).

Appellants here cite two pieces of evidence presented at the McKee trial that were admittedly known to the government at the time of their trial. As to each of these, they claim that the high value to the defense could not have escaped the prosecutor's notice, and thus that a new trial is warranted because of materiality.

The first piece of testimony cited is that of Warren Reitz, one of the principals in the Johnstown Traction Company. He testified at McKee's trial that on February 1, 1966, just before the bids were opened, McKee told him, "Warren, this isn't the way to do this, you should have seen me before." Kahn and Teleprompter now claim that this shows that the bribe had not yet been made, and buttresses their claim that it was not until February 10, following Tompkins' extortion, that they caved in.

The claim is frivolous. The remark would seem to prove just the opposite—that submitting a bid on February 1 was useless, since Teleprompter had already assured itself of the contract with its January 24 bribe. Not only is it impossible for us to conclude that the value of this evidence could not have escaped the government's notice, we doubt whether it is at all material or favorable to the defense. And it goes virtually without saying that we see no significant chance, under the more demanding *Miller* standard, that development of this item would have avoided a conviction.

The second piece of newly discovered evidence was based upon a memorandum of an interview by the government with McKee in June, 1971. That memorandum, used by the government in cross-examining McKee at his trial,

apparently disclosed[17] that McKee had large amounts of cash in his possession; $10,000 in a safe deposit box and $5000 at home.

Appellants argue that this evidence would have established McKee's corruption, and that its value as part of the extortion defense could not have escaped the government. Again, we disagree and see no error in the denial of the new trial motion. First, it requires several giant steps of conjecture to get from the existence of these cash hoards to McKee's participation in systematic extortion.[18] Second, even if the evidence is assumed *arguendo* to be probative of McKee's corruption, it is difficult to see what use the defense could have made of it here. Only Tompkins and Deardorff testified for the government at the Teleprompter-Kahn trial; this evidence could hardly have been used to impeach them, since it involves McKee and does not amount to a conviction. And, even leaving aside the doubtful proposition of whether such evidence could be used to impeach McKee himself,[19] it is simply fanciful on appellants' part to suggest that McKee would have been called to testify had they known about the cash hoards. McKee was, at the time of the Teleprompter-Kahn proceedings, awaiting his own trial; there is not a shred of evidence to suggest that he would have waived the Fifth Amendment to take the stand here. Indeed, appel-

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[17] Appellants have apparently never seen the memorandum; they base their claims as to its contents upon the substance of McKee's cross-examination.

[18] Indeed, since the cash was in McKee's possession as late as 1971, at least $5000 of it may have come from the episode in question here.

[19] Since the evidence does not amount to a criminal conviction, it would ordinarily be inadmissible to impeach the credibility of a witness. *See* the discussion in Part IIIA, *supra*.

lants offer only conjecture as to how this evidence could have been used at all, even in trial preparation. Under any standard of review, Kahn and Teleprompter were not entitled to a new trial on this ground.

The final three pieces of newly discovered evidence involve alleged inconsistencies between the testimony of the city officials at the two trials. No claim is made that these "inconsistencies" were known to the government at the time of the first trial,[20] so the strictest standard of review applies—would the evidence probably produce a different verdict upon retrial?

The first of these claims is based upon Tompkins' testimony at the McKee trial, where he testified that he had asked Kahn to make the payment in cash or stock. At the Kahn-Teleprompter trial, the mayor had denied asking for cash. As Judge Motley found, this evidence at most is impeaching; it seems only to raise a minor question about how the bribe was requested to be paid. There is clearly no real probability that use of this inconsistent statement on cross-examination of Tompkins would have led to a different result in the Kahn-Teleprompter trial, and there was no abuse of discretion in denying the new trial motion on this ground.

Next, appellants claim that Deardorff changed his testimony about what occurred at the Holiday Inn. They claim that while Deardorff testified at the first trial that Kahn had gone into the bathroom with all three officials and

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[20] Appellants do suggest that since they have no proof that the government knew of this evidence at the time of the first trial, the proper course would be to remand for an evidentiary hearing where they might be able to establish the point. "We see no reason to provide this relief and no precedent for it." *DeSapio, supra,* 456 F.2d at 652.

made the offer, he testified at McKee's trial that the subject was broached with him first, and then taken up with the group. Judge Motley doubted that there was any real inconsistency between the two pieces of testimony at all, and we see no reason to quarrel with that conclusion. Indeed, even if Deardorff did change his story on this ground at the McKee trial, the "newly discovered evidence" here hardly meets the strict standard necessary to set aside a jury verdict.

Finally, appellants claim that Deardorff changed his testimony at the McKee trial about whether he talked about the case with other city officials before the trial. Again, even assuming that inconsistencies in the testimony do exist, the evidence would hardly have changed the verdict at the first trial. Considered collectively or individually, the pieces of newly discovered evidence did not warrant a new trial, and Judge Motley did not err in so ruling.

VII. Conclusion

We have carefully considered appellants' other claims, including Kahn's contentions of prosecutorial misconduct and Teleprompter's argument that the admission of the December 17 grand jury testimony against the corporation was error, and we find no merit in them.[21] The judgments of conviction are affirmed.

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[21] Citing *Northern Oil Co.* v. *Socony Mobil Oil Co.*, 347 F.2d 81 (2d Cir. 1965), Teleprompter claims that before an employee's testimony can be attributed to the corporation, there must be a strict showing of specific authorization. However, *Northern Oil* is clearly distinguishable from the case at hand. There, the contested testimony was that of a temporary assistant to a district sales manager; here, Kahn was president, founder, chairman of the board, and a major stockholder of Teleprompter. In this context, the claim that his testimony was not admissible against the corporation is absurd.

APPENDIX B

Opinion of the District Court

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. HOWARD DEARDORFF, *et al.*,

Defendants.

No. 71 Cr. 111.

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Oct. 27, 1971.

WHITNEY NORTH SEYMOUR, JR., U. S. Atty., by Andrew Maloney and John D. Gordon, III, Asst. U. S. Attys., New York City, *for plaintiff.*

DAVIS, POLK & WARDWELL by Robert B. Fiske, Jr., Curtis, Mallet-Prevost, Colt & Mosle by Peter Fleming, Jr., New York City, *for defendants.*

MOTLEY, *District Judge.*

Appendix B—Opinion of the District Court

Memorandum Opinion on Defense of Extortion and Discovery of FBI Files

I.

Defendants are charged in Counts One through Four of a five-count indictment with violating 18 U.S.C. § 1952, the Travel Act, by using the facilities of interstate commerce with intent to promote the commission of the offense of bribery, in violation of the laws of Pennsylvania, and thereafter carrying out that intent, and with conspiring to do the same.[1]

Defendant Kahn, as President and Chairman of the Board of Teleprompter Corporation, is alleged to have traveled to Johnstown, Pennsylvania, with the intent to offer a bribe to his codefendants, the Mayor of Johnstown and two city councilmen, and to have paid the bribe through the mails, in order to induce the Mayor and councilmen to grant a Johnstown cable television franchise to Teleprompter. The defense of defendants Kahn and Teleprompter is that the money in question was extorted from them by the Mayor and councilmen.

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[1] 18 U.S.C. § 1952 provides, in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to— . . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs . . . any of the acts specified in [subparagraph] . . . (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means . . . (2) . . . bribery . . . in violation of the laws of the State in which committed. . . .

Defendants' theory is as follows. Where an offense is charged under 18 U.S.C. § 1952, under the subdivision making it a federal crime to use interstate facilities with intent to promote the commission of bribery in violation of *state* law,[2] the laws of that state determine what defenses defendants may raise to the "state offense element" of the federal crime. That is, if defendants have a defense under the laws of Pennsylvania to the "bribery under state law" element of the federal offense they cannot be held to have violated the Travel Act. Defendants contend that according to the laws of Pennsylvania extortion is a complete defense to bribery.

In pursuing their theory, Kahn and Teleprompter caused a subpoena duces tecum to be issued for all material in the files of the Pittsburgh, Pennsylvania office of the Federal Bureau of Investigation (which includes Johnstown within its jurisdiction) pertaining to all defendants. Their aim was to obtain evidence of a pattern of "shakedown" activity on the part of Tompkins from which it could be inferred that Tompkins had shaken down Kahn and Teleprompter. This evidence is said to be a key element in defendants Kahn and Teleprompter's defense that Mayor Tompkins and the city councilmen extorted the money in question.[3] They claim that under state law their codefendants alleged extortion of funds from them negates any intent to bribe in violation of state law on the part of Kahn and Teleprompter.

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[2] See 18 U.S.C. § 1952(b) (2) quoted in fn. 1.

[3] Despite the admitted importance of the questions raised by the subpoena duces tecum to defendants' defense they have submitted no memorandum on the issues involved.

The government opposed the discovery of any of the FBI material by defendants. It contended that, to its knowledge, the files contain no information relating to "shakedown" activity by Tompkins. Even if the files were found to contain such material, the government stated that it would oppose allowing defendants to inspect and use it on "policy grounds."[4] Also, it was the government's belief that evidence of "shakedown" activity by Tompkins in other contexts than the one in issue in this case would be inadmissible because such evidence would introduce too many collateral issues into the trial. The government maintained further that even if extortion could be proved in the situation involved in this case, it would not be a complete defense to bribery but would only go to the issue of Kahn and Teleprompter's wilfulness and intent.

The court ruled from the bench on the underlying question of the relevance of extortion by the alleged recipient of a bribe to a charge under subdivision (b) (2) of the Travel Act,[5] and on what evidence relating to extortionate activity by Tompkins and Deardorff would be admissible. The court stated that defendants had made no showing that extortion is a complete defense to bribery under Pennsylvania law,[6] but that whether defendants were victims of a shakedown would be relevant to the issue of defendants Kahn and Teleprompter's wilfulness and intent in paying the $15,000, these being elements of the crime of bribery that must be established by the government beyond a rea-

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[4] The government elaborated on the reason for this, saying that if FBI files could be obtained by the defense for any prospective government witness, witnesses would be inhibited from testifying.

[5] See fn. 1.

[6] Defendants cite no Pennsylvania cases directly on this point.

sonable doubt. Thus, evidence of "shakedown" activity by Tompkins in the specific situation in issue in this case would be admissible on the elements of wilfulness and intent.

After an *in camera* inspection of the FBI material, the court ruled that under the above analysis none of it was relevant to any issue in the present case.[7]

II.

The subdivision of the Travel Act whose violation is charged in the instant indictment makes the violation of state law an element of the federal offense. It has been held that state rules of practice and procedure are not binding on federal courts when applying this subdivision of the Travel Act, United States v. Corallo, 413 F.2d 1306, 1323 (2d Cir. 1969), and that state labels for particular offenses, or narrow interpretations of state statutes, will not restrict federal courts in applying it, United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969);[8] see United States v. Kubacki, 237 F.Supp. 638, 643 (E.D.Pa.1965). However, United States v. D'Amato, 436 F.2d 52 (3d Cir. 1970), the case on the Travel Act most closely in point,

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[7] The court further ruled that there was no material obtainable by the defense under the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in the FBI files produced. The material was sealed by the court for transmittal to the Second Circuit Court of Appeals in the event of an appeal by defendants.

[8] In *Nardello,* extortion was the state offense charged under the Travel Act. According to the laws of Pennsylvania, the state in issue, extortion could only be committed by a public official, whereas the same act committed by a private individual was a violation of the state blackmail statute. The Travel Act refers to extortion and bribery as the only state offenses whose commission is within its purview. The Supreme Court held that the federal courts need not be bound by "peculiar versions of state terminology," 393 U.S. at 293-295, 89 S.Ct. 534, so long as state law prohibited the type of conduct in question.

hold that state defenses are available to a defendant charged with violation of the Travel Act, through violation of a state statute, on the state law elements of the federal offense.

Where state law is uncertain on a particular question, federal courts have the right to interpret state law in applying the Travel Act.

> . . . [I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Meredith v. Winter Haven, 320 U.S. 228, 234, 64 S.Ct. 7, 11, 88 L.Ed. 9 (1943).

In *Winter Haven* the Supreme Court stated that it had never hesitated:

> . . . to decide questions of state law when necessary for disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might give remained uncertain. 320 U.S. at 237, 64 S.Ct. at 12.

D'Amato held that:

> This power to decide state-law questions is not limited to cases brought under the Federal court's diversity jurisdiction. In cases brought by virtue of their involvement with Federal questions, the court is not limited to the Federal questions but will decide all of the issues in the case including state-law questions. (citation omitted) 436 F.2d at 54.

See also United States v. Wechsler, 392 F.2d 344 (4th Cir. 1968), 408 F.2d 1184 (4th Cir. 1969) (en banc, per curiam), cert. denied, 392 U.S. 932, 88 S.Ct. 2283, 20

L.Ed.2d 1389 (1969);[9] United States v. Keresty, 323 F.Supp. 230 (W.D.Pa.1971).

Pennsylvania law is, at best, vague on the question of whether extortion is a complete defense to bribery. There are no cases directly on that point, although several cases indicate that the circumstances surrounding the giving of a bribe are considered to be relevant on the issue of the intent of the person giving the bribe. Commonwealth v. Francis, 201 Pa.Super. 313, 191 A.2d 884, 890 (1963); Commonwealth v. Friedman, 193 Pa.Super. 640, 165 A.2d 678, 681 (1960); Commonwealth v. Wilson, 30 Pa.Super. 26, 29-30 (1909).

This court finds that, under Pennsylvania law, extortionate activity on the part of the recipient of a bribe, in connection with the particular bribe charged, is revelant and admissible on the issue of the intent of the person offering the bribe, but is not a complete defense as insanity or duress would be. This would appear to be the rule under federal law as well. See United States v. Barash, 365 F.2d 395, 401-402, 403 (2d Cir. 1966), and cases cited therein.

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[9] In *Wechsler*, the Court interpreted the Virginia bribery statute to determine when the act of bribery could be considered to be completed under state law.

APPENDIX C

Opinion of the District Court

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. HOWARD DEARDORFF, *et al.*,

Defendants.

No. 71 Cr. 111.

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Oct. 5, 1971.

WHITNEY NORTH SEYMOUR, JR., U. S. Atty., by Robert G. Morvillo and D. Gordon III, New York City, for plaintiff.

DAVIS, POLK & WARDWELL by Robt. Fiske, Jr., Curtis, Mallet-Prevost, Colt & Mosle, by Peter Fleming, Jr., Shea, Gallop, Climenko & Gould, New York City, Alan M. Dershowitz, Cambridge, Mass., for defendants Kahn and Teleprompter.

MOTLEY, *District Judge.*

Appendix C—Opinion of the District Court

I. Statement of Facts

A two count indictment was filed against defendants on January 28, 1971. The first count charges defendants with conspiring to violate 18 U.S.C. § 1952 (the Travel Act) by agreeing to use an interstate facility to intentionally promote, manage, establish or carry on or facilitate the promotion, management, establishment or carrying on of the unlawful activity of bribery. The second count alleges, as a substantive violation of 18 U.S.C. § 1952, that the defendants used interstate facilities to intentionally promote, manage, establish or carry on, the unlawful activity of bribery in violation of the Penal Code of the State of Pennsylvania, or facilitate the promotion, management, establishment or carrying on of such activities.

The Government alleges the following account. On January 18, 1966 defendant Kenneth O. Tompkins, then the mayor of Johnstown, Pennsylvania, and defendants Robert McKee and J. Howard Deardorff, then city councilmen of Johnstown, caused the approval of an ordinance to permit sealed competitive bidding for a cable television franchise in Johnstown. Six days later, on January 24, Irving Kahn, president of Teleprompter, travelled from New York to Johnstown to meet with those three city officials. At the meeting Kahn, Tompkins, McKee and Deardorff agreed that Teleprompter would pay the three Johnstown officials a $15,000 bribe if they would vote in favor of awarding the cable television franchise to Johnstown Cable TV, a subsidiary of Teleprompter.

At the February 1, 1966 meeting of the committee of the whole of the Johnstown City Council, Tompkins, McKee

and Deardorff voted to reject all bids on cable television submitted by Teleprompter's competitors.

At a general session of the City Council on February 8, Tompkins made a motion to arrange a meeting with officers of Teleprompter to discuss terms for a cable television franchise. Deardorff seconded the motion, and all three defendant officials voted for it.

Finally, at the March 2 general session of the Johnstown City Council, these three defendants voted for Ordinance No. 3678, which granted Johnstown Cable TV a ten-year exclusive cable television franchise with an option to renew for ten years.

Meanwhile, on February 25, 1966 Kahn and Teleprompter transmitted $7,000 to defendant Tompkins in Johnstown. Tompkins, in turn, gave McKee and Deardorff each $2,000 sometime in March. On August 26, 1966 Kahn and Teleprompter sent Tompkins another payment, this time of $6,035.61. A third payment of $1,464.39 was made to Tompkins by Kahn and Teleprompter on October 20. Tompkins again gave McKee and Deardorff $2,000 each soon after receiving the last installment from Kahn and Teleprompter.

The Government alleges, in sum, that Kahn sent Tompkins a total of $14,500.00, of which Tompkins gave McKee and Deardorff $4,000 apiece. In return, it is charged, the three defendants used their official positions to provide Teleprompter's subsidiary with the exclusive Johnstown cable television franchise.

Defendants have made a variety of pre-trial motions. They move to dismiss the indictment on the ground that their alleged conduct does not violate federal law, and on

the ground that the grand jury was improperly selected. They also move to dismiss the conspiracy count. They further move for a bill of particulars and for discovery and inspection. There is also a motion for an order directing the government to ascertain and disclose the fruit of any monitoring it has conducted.

II. Motion to Dismiss the Indictment Because the Alleged Conduct Does Not Violate Federal Law

There can be no doubt that the alleged activities of defendants fall within the literal terms of the statute. The relevant part of 18 U.S.C. § 1952, including its title, reads as follows:

> "Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Defendants are charged with carrying on unlawful activity in violation of Section 1952(a) (3). The unlawful activity with which they are charged is defined in subsection (b) (2) as ". . . bribery . . . in violation of the laws of the State in which committed or of the United States." The phrase "business enterprise" used in defining unlawful activity in subsection (1) of § 1952(b) is not used in subsection (2) delineating bribery as an unlawful activity. Read literally, therefore, the statute does not require that bribery in violation of § 1952 be connected with a criminal business enterprise. The indictment thus clearly alleges facts bringing defendants within the terms of the statute.

Defendants contend, however, that bribery must be connected with, or in aid of, a racketeering enterprise to violate § 1952. In support of this interpretation they point to the language of the title of § 1952, the section's legislative history, and its recent interpretation in Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). For the reasons which follow, the court rejects defendants' interpretation of § 1952 and finds their alleged conduct within its terms.

The title of § 1952, as reproduced above, refers to "interstate or foreign travel or transportation in aid of racketeering enterprises." Defendants feel that this title,

in conjunction with legislative history, requires that connection with racketeering enterprises be considered an element of the offense. However, the title of a statute cannot limit the plain meaning of the text, and is resorted to only where ambiguity already exists. Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1946); United States v. Minker, 350 U.S. 179, 76 S.Ct. 281, 100 L.Ed. 185 (1956); Tibke v. Immigration and Naturalization Service, 335 F.2d 42 (2 Cir., 1964). See also Sutherland, Statutory Construction § 4802 (3d ed. Horack 1943). As we have seen above, the body of Section 1952 is clear. There is thus no need to look to the title, an endeavor that in this case would produce, rather than ameliorate, ambiguity.

Were we to seek guidance from the title, however, we would find that it adds nothing to the meaning of the text. The term "racketeering enterprise" is not specifically defined in Title 18, but the terms "racketeering activity" and "enterprise" are defined in 18 U.S.C. § 1961. "Racketeering activity" is defined as "any act which is indictable under any of the following sections of Title 18, United States Code: . . . Section 1952. . . ." Section 1961 (1) (B). "Enterprise" is defined as "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Section 1961(4). Combining the two definitions a "racketeering enterprise" becomes an individual or group of individuals engaging in acts indictable under § 1952. This definition certainly does not elucidate the elements of a violation of § 1952 itself.

Defendants stress that the legislative history of § 1952 demonstrates that the section can be applied only where

organized crime and racketeering are involved. It is a common rule of statutory interpretation that legislative history not be used to interpret a statute that is clear and unambiguous on its face. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1916); Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949). See also Sutherland, *supra*, § 4502; United States v. Great Northern Ry. Co., 343 U.S. 562, 72 S.Ct. 985, 96 L.Ed. 1142 (1952).

This canon of interpretation is particularly apposite where the legislative history is itself somewhat ambiguous. For example, defendants cite passages in the hearings that indicate that § 1952 was aimed at organized crime.[1] On the other hand, the Ninth Circuit Court of Appeals has found that subsection (b) (2) sought to prevent and punish single criminal acts, not necessarily a continued course of conduct. Marshall v. United States, 355 F.2d 999, 1003 (9th Cir., 1966). Reconciliation of conflicting legislative history, however, is a latter stage of statutory interpretation, not the first step.

Defendants place great reliance on the Supreme Court's decision in Rewis v. United States, *supra*. The convictions in that case centered around an illegal lottery, or numbers operation, in northern Florida. There were essentially two

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[1] For example, the following testimony of Attorney General Robert F. Kennedy appears in the Senate Report (Report No. 644, 87th Cong., 1st Sess., pp. 15-16):

> "The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise."

groups of defendants: 1) a group of customers of the lottery who resided in Georgia and crossed into Florida to place bets, and 2) a group which conducted the gambling operation but never crossed state lines as part of their gambling activities.

As to the first group, the customers, the Court of Appeals held that "the patronizing by interstate gamblers of a gambling establishment" does not fit within the statutory terminology of "promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity." Rewis v. United States, 418 F.2d 1218, 1221 (5th Cir. 1969). The Supreme Court affirmed. 401 U.S. at 810, 91 S.Ct. at 1058.

The second group of defendants, those who operated the numbers operation, were found by the Supreme Court to have been insufficiently related to interstate travel to fall within the Travel Act. That Act, it was held, does not apply to criminal activity "solely because that activity is at times patronized by persons from another State." Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).

Measured by the facts alleged in the indictment, defendants' actions differ from those of both groups of defendants in *Rewis*. Defendants Kahn and Teleprompter are charged with being the perpetrators of the bribery scheme. Unlike the customers of the numbers operation, their acts, if proved, amount to the promotion, management, establishment or carrying on, or the facilitation thereof, of the unlawful activity of bribery.

Defendant Kahn allegedly travelled in interstate commerce to Johnstown to offer the bribe. He also allegedly sent a number of the payments interstate from defendant

Teleprompter to other defendants. The intimate connection between the use of interstate facilities and the crimes charged differentiates these defendants from the second group of defendants involved in *Rewis*. Here, there is no question that the alleged crime of Kahn and Teleprompter is substantially interstate in nature.

Finally, in sustaining the indictment against defendants, the court notes that all other courts that have ruled on this question have upheld the application of § 1952 to isolated instances of extortion and bribery. See Marshall v. United States, 355 F.2d 999 (9th Cir. 1966), cert. denied, 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54 (1966); McIntosh v. United States, 385 F.2d 274 (8th Cir. 1967); United States v. Zirpolo, 288 F.Supp. 993 (D.N.J. 1968); rev'd on other grounds, 450 F.2d 424 (3rd Cir. 1971); United States v. Feudale, 271 F.Supp. 115 (D.Conn. 1967).

III. Motion to Dismiss Conspiracy Count

Defendants Kahn and Teleprompter move to dismiss count one of the indictment on the ground that there can be no conspiracy to commit a crime which can only be committed by the concerted action of the parties to the agreement.

Defendants' discussion of the law in this area mistakenly relies on cases concerning conspiracy to commit the substantive crime of bribery. The substantive crime charged in this indictment is not bribery but use of interstate facilities to commit an unlawful act. No concerted action is required to violate § 1952, regardless of whether the underlying unlawful act usually requires joint action,

like bribery, or does not, as with arson. United States v. Parzow, 391 F.2d 240 (4th Cir. 1968); United States v. Zirpolo, *supra.*

IV. Challenge to Grand Jury

Defendants Irving Kahn and Teleprompter Corporation have moved to dismiss the indictment in this case on the grounds that: 1) the grand jury which indicted defendants was constituted in contravention of the standards set forth in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq.; and 2) the master jury wheel and the jury venire from which defendants' grand jury was chosen did not include, or had an underrepresentation of, the young, the poor, blacks, the poorly educated, and the unskilled, with the result that defendants were denied their constitutional rights under the Fifth and Sixth Amendments.

In conjunction with this motion, defendants Kahn and Teleprompter Corporation have moved on the authority of 28 U.S.C. § 1867(f) to discover a random sampling of the questionnaires completed by prospective jurors in the Southern District of New York; specifically, one quarter of the questionnaires mailed by the Clerk in November, 1969, and returned prior to May 10, 1970, as well as all of the questionnaires completed by members of the grand jury panel from which the grand jury which indicted defendants was selected.[2] Defendants have also moved, pursuant to

[2] According to the affidavit of Michael D. Schmitz, one of the attorneys for defendants Kahn and Teleprompter Corporation, Mr. Schmitz asked former Chief Judge Sugarman of this Court to supply him with the names and juror questionnaires of the jury venire from which defendants' grand jury was selected. The affidavit states that the desired names were given, but that the questionnaires were withheld. The affidavit does not indicate whether a demand was made for every fourth questionnaire mailed in November, 1969, and returned prior to May 10, 1971.

28 U.S.C. § 1867(d), for a hearing on their statutory and constitutional challenges to the grand jury in order to present to the court the questionnaire data sought to be discovered here.

A.

The grand jury in question was selected in accordance with procedures set forth in the "Plan for Random Selection of Grand and Petit Jurors in the United States District Court for the Southern District of New York."[3] This plan was formulated under the authority of 28 U.S.C. § 1863(a) which provides, in part:

> Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title . . .

As the first branch of their argument defendants contend that the Southern District Plan substantially fails to comply with the statutory mandate for the jury selection procedure set forth in § 1863(a) and related sections.

The Southern District procedure for selecting jurors, which first went into effect on December 22, 1968, is basically as follows. The source of names for the master jury wheel is the voter registration lists of the various counties comprising the Southern District of New York, the age of

[3] As amended March 6, 1969, approved by the Reviewing Panel of the Second Circuit, March 6, 1969. The Plan first went into effect on December 22, 1968.

twenty-one being fixed as the minimum age for jury service. Plan, Art. III (A); Art. VI. (1). Names are selected for the master jury wheel at random from each county's registration lists in a proportion equal to the ratio that the number of names on the particular county's lists bears to the total number of names on all of the counties' lists. Questionnaires are then mailed to a certain number of persons randomly chosen from the master jury wheel. Those jurors who qualify on the basis of their completed questionnaires, and are not otherwise excused, are placed on the qualified jury wheel—the source of the grand jury venires and the individual grand juries. The Plan provides that the master wheel be completely emptied and refilled every four years. Art. III. (B).

Defendants challenge several aspects of the Plan as not complying with the Jury Selection and Service Act of 1968. First, they point to the objective of 28 U.S.C. § 1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section* of the community in the district or division wherein the court convenes . . . (Emphasis added)

While the statute provides for the use of voter registration lists, or lists of actual voters, as the main source for juror lists, it states that: "The [district court] plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title." 28 U.S.C. § 1863 (b) (2). Defendants contend that the Southern District procedure of relying on voter regis-